



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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Mr. J. Greg Hudson  
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OR2005-01095

Dear Mr. Hudson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 218263.

Collin County (the "county"), which you represent, received a request for thirteen categories of information regarding the 2004 general election. You state that the county will release information responsive to items 1 and 5-7. You also state that the county will release information responsive to items 2-4 and 8 that is not contained in locked ballot boxes, but you claim that the remaining requested information responsive to items 2-4 and 8 is excepted from disclosure under section 552.101 of the Government Code. You further claim that items 9-13 do not constitute public information under the Act. Alternatively, you assert that items 9-13 may be excepted from disclosure under section 552.110 of the Government Code, but you make no arguments regarding this exception. Instead, pursuant to section 552.305 of the Government Code, you have notified an interested third party, Diebold Election Systems, Inc. ("Diebold"), of the request and of its opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received comments from Diebold. We have considered all submitted arguments and reviewed the submitted information.

Initially, we address the county's assertion that the Act does not apply to the information requested in items 9-13. In items 9-13, the requestor asks for various application source codes, object codes, database schematics, source programs, and embedded hardware codes. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Open Records Decision No. 581 at 6 (1990) (construing predecessor statute). You state that the requested items 9-13 "pertain to the computer software coding used in the Diebold voting machines[.]" Having considered this representation and reviewed the submitted records, we find that, like the computer-related information at issue in Open Records Decision No. 581, the information at issue here functions solely as a tool to maintain, manipulate, or protect public property and has no independent relevance. *Id.* As such, this type of information is not public information as defined by section 552.002 of the Government Code, and, therefore, is not subject to the Act. Thus, items 9-13 need not be released in response to this request.<sup>1</sup>

We now address the county's claim of section 552.101 of the Government Code for some of the information requested in items 2-4 and 8. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. We understand you to claim that insofar as items 2-4 and 8 request information contained in locked ballot boxes, this information is confidential under section 66.058 of the Election Code. Section 66.058 requires the custodian of election records to securely preserve voted ballots in a locked room in the locked ballot box in which they are delivered. *See* Elec. Code § 66.058(b). Furthermore, except as permitted by the Election Code, a ballot box containing voted ballots may not be opened during the preservation period. *See id.*

Section 66.058 reads in part as follows:

(a) Except as otherwise provided by this code, the precinct election records shall be preserved by the authority to whom they are distributed for 60 days after election day.

(b) The voted ballots shall be preserved securely in a locked room in the locked ballot box in which they are delivered to the general custodian of election records. Except as permitted by this code, a ballot box containing voted ballots may not be opened during the preservation period.

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<sup>1</sup> As our ruling is dispositive, we need not address Diebold's arguments regarding this information.

(d) A custodian of a ballot box containing voted ballots commits an offense if, during the preservation period prescribed by Subsection (a), the custodian:

(1) makes an unauthorized entry into the box; or

(2) fails to prevent another person from handling the box in an unauthorized manner or from making an unauthorized entry into the box.

(e) An offense under Subsection (d) is a Class A misdemeanor.

...

(g) The precinct election records in an election involving a federal office shall be preserved by the authority to whom they are distributed for at least 22 months after election day in accordance with federal law. The secretary of state shall instruct the affected authorities on the actions necessary for compliance with federal law.

*Id.* § 66.058 (a)-(b), (d)-(e), (g). "Precinct election records" means the precinct election returns, voted ballots, and other records of an election that are assembled and distributed under chapter 66 of the Election Code. *See id.* § 66.002.

You inform us that the 2004 general election included a federal election. In Open Records Decision No. 505 (1988), this office determined that, under section 66.058, the voted ballots from a primary election are exempt from public disclosure only during the prescribed retention period and that a request made during the retention period to inspect voted ballots must be treated as a request to inspect the ballots when the retention period expires. The decision also determined that, under section 66.058(g), the preservation period for ballots cast in an election involving a federal office is 22 months after election day and the voted ballots are protected from required disclosure under the predecessor to section 552.101 during the preservation period. *See* Open Records Decision No. 505 at 2 (1988). Thus, unless authorized by the Election Code, federal election records must be in a locked room in a locked box for a period of 22 months with no unauthorized access. *See* Open Records Decision No. 505 (1988).

The Election Code authorizes access to voted ballots during the preservation period for several purposes, including, for example, recounts, election contests, criminal investigations, and counts conducted pursuant to chapter 127 of the election Code. *See* Open Records Decision No. 505 at 2 n. 2 (1988). We have no information that the Election Code authorizes access to the records in this situation. Therefore, the requested election records are confidential as long as the records are required to be preserved, 22 months after election day. After that period, the records are subject to public disclosure. *See* Open Records Decision No. 505 at 3.

In summary, we conclude that information requested in items 9-13 is not subject to disclosure under the Act and need not be released. Also, insofar as items 2-4 and 8 request ballot information subject to section 66.058 of the Election Code, such information may not be subject to disclosure until 22 months after election day.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

CEC/sdk

Ref: ID# 218263

Enc. Submitted documents

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